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Supreme Court of the United States

OCTOBER TERM, 1940.

No. 269.

PANHANDLE EASTERN PIPE LINE COMPANY,
Appellant,

vs.

THE UNITED STATES OF AMERICA, COLUMBIA GAS & ELECTRIC CORPORATION, COLUMBIA OIL & GASOLINE CORPORATION, GEORGE H. HOWARD, PHILIP G. GOSSLER, CHARLES A. MUNROE, THOMAS R. WEYMOUTH, THOMAS B. GREGORY, EDWARD REYNOLDS, JR., BURT R. BAY and JOHN H. HILLMAN, JR.,

Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

BRIEF OF APPELLEE, COLUMBIA OIL & GASOLINE CORPORATION.

DANIEL O. HASTINGS,
Continental American Building,
Wilmington, Delaware.

WILLIAM H. BUTTON,
27 Cedar Street,
New York, N. Y.

JAMES B. ALLEY,
50 Broadway,
New York, N. Y.

Of Counsel:
WILLIAM H. BUTTON,
JAMES B. ALLEY.

Pandick Press, Inc., 22 Thames St., New York, U. S. A.

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Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF DELAWARE.

BRIEF OF APPELLEE, COLUMBIA OIL & GASOLINE CORPORATION.

Decision of the Lower Court.

This brief is submitted by the appellee Columbia Oil & Gasoline Corporation (hereinafter referred to as Columbia Oil) in opposition to the purported appeal of the appellant, Panhandle Eastern Pipe Line Company (hereinafter referred to as Panhandle Eastern), from an order of the District Court of the United States for the District of Delaware, dated April 23, 1940 (R.* 565). That order

* The Transcript of Record on this appeal will be referred to as "R."

granted motions (R. 426, 514-516) made by the appellees Columbia Gas & Electric Corporation (hereinafter referred to as Columbia Gas) and Columbia Oil on March 29, 1940, to dismiss an application (R. 412-424) made on March 23, 1940, in the name of Panhandle Eastern for leave to intervene in the anti-trust suit instituted by the Government in the District Court against the other appellees herein. Prior to the entry of the order, the District Court handed down an opinion which is printed at pages 520-526 of the Record and is reported in 32 Fed. Supp. 474. For the convenience of this Court that opinion is printed at the end of this brief as Appendix A.

The motions to dismiss the application in the court below were made upon the limited grounds (R. 426, 515) that the application was not authorized by Panhandle Eastern and that the attorneys who made the application were not authorized by Panhandle Eastern to act in its behalf in making or prosecuting such application or otherwise. The court granted these motions solely on these limited grounds (R. 520).

This peculiar situation was brought about by the fact that the attorneys who are allegedly acting for Panhandle Eastern in this matter claim that they are acting for Panhandle Eastern under the authority of certain resolutions allegedly adopted at a stockholders' meeting of Panhandle Eastern, held on March 11, 1940 (R. 423, 425). All the preferred stock and a majority of the common stock of Panhandle Eastern, however, were owned by Columbia Oil (R. 150, 448), but due to the provisions of the Consent Decree herein (R. 146), the legal title to all this stock has been vested in Mr. Gano Dunn (R. 150), with the power to elect six out of the nine directors of Panhandle Eastern (R. 523), and to vote on other subjects as directed by Columbia Oil (R. 147). In short, Mr. Dunn had entire control of that stockholders' meeting (R. 428-480).

Despite that fact and despite the adverse votes of Mr. Dunn, said attorneys claim that at the meeting the minority stock interests, namely, Missouri-Kansas Pipe Line Company (hereinafter referred to as Mokan), not only had the right to but did take control of this important corporation, amended its by-laws (R. 451, 460), elected a Board of Directors (R. 458), appointed officers (R. 460), and hired counsel (R. 461-463).

It is evident that a situation of this sort must have caused some concern, not only to Mr. Dunn but to Columbia Oil, the beneficial owner of the majority stock of Panhandle Eastern. Accordingly, when the attorneys for Mokan, claiming to act for Panhandle Eastern, made the application in the name of Panhandle Eastern for leave to intervene in the Government's anti-trust suit pursuant to authority which they claim was conferred upon them at this strange stockholders' meeting, Columbia Oil and Columbia Gas promptly moved in the District Court to dismiss that application (R. 426, 514-516). After a full hearing, that court decided that the actions of the minority interests at the stockholders' meeting of Panhandle Eastern were void and unjustifiable; that Mr. Dunn's votes in opposition to such alleged actions were valid; and that the attorneys claiming to act for Panhandle Eastern had no authority to do so (R. 520-526). In the meantime, the minority interests, in other words Mokan, realizing the weakness of their position instituted a proceeding in the Chancery Court of the State of Delaware in an effort to validate what they hoped they had accomplished at this peculiar stockholders' meeting (R. 510-514).

After a full hearing in that proceeding, the Chancellor of the State of Delaware confirmed the election of nine directors whose election had not been contested, and held that the five additional persons who had been nominated as

directors by the minority interests had not been elected, and that all attempts by the minority interests to amend the by-laws, appoint officers and hire counsel were wholly void and without effect (Appendices B and C).

It should be noted that under the General Corporation Laws of the State of Delaware,* the Chancellor is vested with the exclusive power over such internal corporate controversies. The Chancellor's decree is, therefore, final and conclusive on the invalidity of the attempted actions of the minority interests at the stockholders' meeting, as well as on the lack of authority of these attorneys who claim to represent Panhandle Eastern on the basis of such invalid actions. No appeal has been taken from the Chancellor's decree and, therefore, his decision is final in the matter.

Questions Presented.

The only questions presented on this appeal are

(a) Whether this Court has the jurisdiction to consider this appeal,

(b) Whether the application for leave to intervene in the anti-trust suit in the District Court was authorized by Panhandle Eastern, and

(c) Whether the attorneys who made said application in the name of Panhandle Eastern were authorized by Panhandle Eastern to act on its behalf.

Statement of the Case.

The cause pending in the District Court in which the application to intervene was sought to be filed is a suit, originally instituted by the United States Government on

* Section 31 of the General Corporation Laws of the State of Delaware is printed in full in Appendix D at the end of this brief.

March 6, 1935, by a bill in equity against Columbia Gas, Columbia Oil and several individual defendants (R. 1), in which the defendants were charged with dominating and controlling the affairs of Panhandle Eastern and restraining, monopolizing and attempting to monopolize interstate trade and commerce in natural gas in certain sections of the United States, in alleged violation of the Federal Anti-Trust Laws (R. 10-30). The defendants, including Columbia Gas and Columbia Oil, filed answers denying these charges (R. 109-138).

The case was never tried. On January 29, 1936, a Consent Decree (R. 142-149) was entered upon a stipulation signed by all the parties (R. 138-142), in which the defendants maintained the truth of their answers and consented to the entry of the decree provided that such consent and entry of said decree should not constitute an admission or adjudication that they had violated any laws of the United States (R. 139).

One of the provisions of the Consent Decree permitted Columbia Cil to retain its stockholdings, and acquire additional stockholdings, in Panhandle Eastern (R. 145), but required these stockholdings to be transferred to Mr. Gano Dunn, as Trustee, who was to hold the legal title to said stock and exercise all the rights and privileges incidental to the absolute ownership thereof (R. 146), with broad discretionary voting powers which will be discussed in more detail in Point III hereof.

From shortly after the entry of the Consent Decree up to the present time, Columbia Oil has been the beneficial owner of 100,000 shares of Class A and 10,000 shares of Class B preferred stock of Panhandle Eastern (being all the issued and outstanding shares of these classes), and 404,326 shares of its common stock (being a majority of the issued and outstanding shares of common stock), and

Mr. Dunn has held this stock and voted the same as Trustee pursuant to the terms of the Consent Decree (R. 150, 431, 516). This stock carries the right to elect six of the nine directors of Panhandle Eastern (R. 523).

On January 12, 1939, approximately three years after the entry of the Consent Decree, the Government filed a supplemental complaint in the District Court seeking to supplement the decree by a further order for the purpose of accomplishing what it construed the purposes of the decree to be (R. 274-283). The defendants, including Columbia Oil and Columbia Gas, filed their answers to the supplemental complaint (R. 313-314, 322-332), and this was followed by further proceedings in the anti-trust suit which are not pertinent to the issues involved on this appeal except to the extent hereafter discussed. This Court will find a more detailed statement thereof in the brief of this appellee submitted in appeal No. 268 which is now pending before this Court, the record on which has been consolidated with the record on this appeal.

Mokan is a substantial minority stockholder of Panhandle Eastern claiming ownership to 339,275 shares of its common stock (R. 538). The intervention application involved on this appeal is the third of a series of four intervention applications which have been made by Mokan, or by its attorneys, for leave to intervene in the anti-trust proceedings pending in the District Court (R. 283-312, 362-371, 412-424, 526-540). All these applications have been denied or dismissed by the District Court (R. 321-322, 371, 565, 541-542). Appeals were taken from the orders denying the first two applications to the United States Circuit Court of Appeals for the Third Circuit, and were dismissed by the Circuit Court on December 15, 1939 (R. 6). The Circuit Court's opinion is reported in 108 Fed. (2nd) 614. A petition for a writ of certiorari was denied by this Court

on April 22, 1940 (309 U. S. 687). This appeal No. 269 and appeal No. 268, both of which are now pending in this Court, are the appeals from the two orders dismissing and denying the third and fourth intervention applications, respectively.

In substance, the allegations in the present application (third intervention application) are identical with those contained in the fourth application, and the prayers for relief in both applications are the same. Likewise, the allegations and prayers for relief in the present application are substantially the same as those in the first application which was made on February 6, 1939 (R. 284), except that the prayers in the present application are slightly more limited in scope.

The present application is unverified and is not signed by any officer or director of Panhandle Eastern, but is signed by Arthur G. Logan and two other attorneys (R. 424) who concededly are counsel for Mokan (R. 429, 477, 505-508, 514, 540, 550-551, 555-557). Counsel for Panhandle Eastern are Messrs. E. M. Goodwin and Edwin D. Steele, Jr. (R. 429), neither of whose names, it will be noted, appear on the present application. It is claimed in the application, however, that Mr. Logan and his associates were duly authorized to make that application by virtue of resolutions adopted at the annual meeting of stockholders of Panhandle Eastern held on March 11, 1940, and that Mr. Dunn, the Trustee under the Consent Decree, sought to vote against such resolutions but that his vote was improperly and illegally cast (R. 423, 425).

An examination of the minutes of the annual stockholders' meeting of Panhandle Eastern held on March 11, 1940, which is part of the record on this appeal (R. 428-487), discloses that at the opening thereof, Mr. Greveling, the President, took the chair, called the meeting to order

(R. 428-429) as provided by the by-laws (R. 494), and announced the presence of a quorum (R. 432). Immediately, Mr. Logan, who held 10 shares of stock which were being voted by proxy (R. 448), moved that Mr. A. Faison Dixon, Vice-President of Mokan, be made Chairman of the meeting (R. 432). Mr. Creveling declared the motion out of order in view of the provision of the by-laws that the President shall preside at all meetings of the stockholders (R. 494). Mr. Logan took an appeal from the ruling of the chair, declaring that Mr. Dunn (the majority stockholder) could not vote Columbia Oil's stock without specific instructions as to how he should vote the stock on that particular motion, and that Mr. Dunn could not have any such specific instructions because it could not have been known by Columbia Oil that such a motion would be made (R. 432-433). A vote was taken and Mr. Dunn voted to uphold the chair while Mr. Logan and five of his associates voted to the contrary (R. 434).

After Mr. Logan had again questioned Mr. Dunn's right to vote (R. 434), and vehemently insisted that Mr. Creveling should surrender the chair to Mr. Dixon, Mr. Creveling disallowed Mr. Logan's appeal to disqualify Mr. Dunn's vote, refused to relinquish the chair, and proceeded to the next order of business (R. 435-436). Thereupon, Mr. Logan demanded that whenever Mr. Dunn should vote on any motion he should produce the specific instructions from Columbia Oil showing that he was voting as instructed, and that, in the absence of such showing, Mr. Logan challenged his vote (R. 436). This same procedure continued throughout the meeting. Whenever any motion was made of which Mr. Logan and his associates disapproved and which was carried by Mr. Dunn's vote, Mr. Logan claimed that Mr. Dunn's vote was invalid because of his failure to produce specific instructions from Columbia Oil as to how he should

vote, and likewise whenever Mr. Logan or his associates proposed any motion or resolution which was defeated by Mr. Dunn's opposing vote, Mr. Logan claimed that Mr. Dunn's vote was invalid for the same reason.

The following motions and resolutions, (sometimes in the form of appeals from rulings of the chair refusing to rule as requested), were made or proposed by Mr. Logan or his associates:

(a) Motion to amend the by-laws to increase the Board of Directors from nine to fourteen directors (R. 451-452);

(b) Appeal from the ruling of the chair refusing to declare five additional men, nominated by the representatives of Mokan, elected as directors in addition to the nine directors which were declared elected (R. 457-458);

(c) Appeal from the ruling of the chair refusing to reject the judges' report on the election of two directors elected by the Class B preferred stock (R. 458-459);

(d) Motion to amend the by-laws to provide for officers to be chosen by the stockholders instead of by the directors and to provide that all officers' salaries be fixed by the stockholders instead of by the directors (R. 459-460).

(e) Motion to elect Messrs. Maguire, Neuner, Watkins and Tringham, the first and last named persons being President and Secretary, respectively, of Mokan, to the offices of President, Vice-President, Secretary and Treasurer, respectively, of Panhandle Eastern (R. 460-461);

(f) *Resolutions that Panhandle Eastern bring six suits as requested in a letter from Mokan dated January 15, 1940 (one of which was to make the instant application), employ Mokan's attorneys to undertake*

such proceedings and pay reasonable fees to such attorneys (R. 461-463);

(g) Resolutions that Panhandle Eastern appear and prosecute a certain injunction suit which had already been instituted by Mokan and another, employ Mokan's attorneys to undertake the matter and pay reasonable compensation to such attorneys (R. 463-464); and

(h) Resolution that Panhandle Eastern redeem its class A preferred stock (R. 464-466).

In each instance, Mr. Dunn voted the majority of the voting stock against the motion, resolution or appeal from the ruling of the chair, and Mr. Logan and his associates voted in favor thereof. In each instance the chair ruled that the motion, resolution or appeal, as the case might be, was lost.

The resolutions, noted in italics under subdivision (f) above, are the resolutions on which the attorneys predicate their authority to bring the instant application. Those resolutions were defeated by the vote of Mr. Dunn voting the majority of the voting stock in opposition thereto (R. 462). Mr. Logan again objected to Mr. Dunn's vote on the ground that he should exhibit specific instructions from Columbia Oil instructing him to vote in opposition to those resolutions, and also on the further ground that he could not vote even if he did have such specific instructions, because the action contemplated by such resolutions was against Columbia Oil, and, therefore, he would be disqualified in following any instructions from it on the matter. The chairman accepted Mr. Dunn's vote and declared the resolutions lost (R. 462).

Finally, a motion was made to adjourn. Mr. Dunn voted the majority stock in favor of adjournment and the chair-

man announced that the motion was carried and the meeting adjourned (R. 480). Thereupon, Mr. Creveling, Mr. Dunn and another left the room and Mr. Logan and his associates remained (R. 481). No quorum was present, nevertheless, Mr. Dixon took the chair (R. 481), the motions, which had previously been defeated, were again resubmitted and Mr. Logan and his associates voted in favor thereof (R. 481-487).

The specific provisions of the Consent Decree pursuant to which Mr. Dunn was empowered as Trustee to vote Columbia Oil's stock, and the directions which he had received from Columbia Oil before the meeting as to how he should vote such stock, will be discussed in more detail in Point III hereof.

Two days following the stockholders' meeting of Panhandle Eastern, Mokan instituted an action, pursuant to Section 31 of the Delaware Corporation Law* in the Court of Chancery of the State of Delaware, to review the election of directors and officers of Panhandle Eastern at the stockholders' meeting (R. 510-514). The bill of complaint alleged that the by-laws of Panhandle Eastern had been amended at the meeting to increase the Board of Directors from nine to fourteen members and that fourteen directors, including the five additional directors nominated by the representatives of Mokan, had been duly elected and had qualified (R. 511). The bill further alleged that the by-laws had been amended at the meeting to provide for the election of officers by stockholders, and that Messrs. Maguire, Neuner, Watkins and Tringham had been duly elected as President, Vice-President, Secretary and Treasurer, respectively, of Panhandle Eastern (R. 511-512). The bill prayed that the Chancellor determine the validity of the election of the

* Section 31 of the General Corporation Laws of the State of Delaware is printed in full in Appendix D at the end of this brief.

five additional directors nominated by the representatives of Mokan, and declare that said persons were duly and validly elected to the Board of Directors; and that the Chancellor determine the validity of the election of Messrs. Maguire, Neuner, Watkins and Tringham to the offices of President, Vice-President, Secretary and Treasurer, respectively (R. 513-514).

On June 19, 1940, after a full hearing before the Chancellor and during the pendency of the instant appeal, the Chancellor entered his final decree* in that proceeding dismissing Mokan's bill of complaint holding: (a) that none of the additional five directors nominated by the representatives of Mokan were elected as directors of Panhandle Eastern at the stockholders' meeting, (b) that Maguire, Neuner, Watkins and Tringham had not been elected as officers of Panhandle Eastern at the meeting, and (c) that the action at the annual meeting of the representatives of Mokan purporting to amend the by-laws of Panhandle Eastern "was void and without effect and such by-laws were not modified in any respect whatsoever by any action taken at said meeting".

Instead of rendering a formal opinion the Chancellor wrote an opinion letter† dated June 11, 1940, to counsel for the interested parties setting forth his views on the matter. It necessarily follows from the Chancellor's decision that Mr. Dunn's votes at the meeting in voting the majority stock were valid and legal. No appeal has been taken from the Chancellor's order.

In the meantime, on March 23, 1940, Mokan's attorneys made the intervention application in the name of Panhandle

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* For the convenience of this Court, the final decree of the Chancellor is printed at the end of this brief as Appendix B.

† For the convenience of this Court, a copy of this opinion letter is printed at the end of this brief as Appendix C.

Eastern which is the subject of this appeal (R. 412-422). In its opinion handed down on April 6, 1940 (R. 520-526) on which the order of dismissal (R. 565) was entered, the court below held: (1) that the application was not authorized by Panhandle Eastern, (2) that the attorneys whose names appear on said application were not authorized by Panhandle Eastern to act in its behalf, and (3) that Mr. Dunn had duly voted the shares of stock of Columbia Oil in Panhandle Eastern on all matters on which he had voted at the annual stockholders' meeting in accordance with the provisions of the Consent Decree and pursuant to valid directions from Columbia Oil (R. 525-526). Thus, the Court granted the motions of Columbia Oil and Columbia Gas to dismiss the application on the specific grounds urged by Columbia Oil in its motion papers (R. 515).

The instant appeal is from the order of the court below dismissing the aforementioned intervention application.

POINT I.

Appellee, Columbia Oil & Gasoline Corporation, by its motion to dismiss the application to intervene, with supporting affidavits, properly raised the question of the authority of the attorneys prosecuting this appeal to act on behalf of Panhandle Eastern Pipe Line Company in making and prosecuting the intervention application.

It is settled that a court may in its discretion, at any stage of a case, require an attorney to show his authority to bring proceedings on behalf of a client, and that the appropriate manner in which to raise this question is by motion to dismiss such proceedings supported by affidavits. This Court conclusively established this principle in the

leading case of *The Pueblo of Santa Rosa* v. *Fall*, 273 U. S. 315, which has been consistenly followed by the courts in later decisions. There, as here, a motion was made by the defendants, supported by affidavits, to dismiss the bill upon the ground that the plaintiff had never authorized the suit and had never authorized the attorneys to bring or prosecute it on its behalf. This Court agreed with the conclusions of the District Court in dismissing the bill, except to the extent that that court had dismissed it upon the merits, and, therefore, remanded the cause to the District Court with directions to dismiss the bill on the ground that the suit was brought by counsel without authority, but without prejudice to the bringing of any other suit thereafter by and with the authority of the plaintiff. This Court said at page 319:

> "Whether, as a matter of practice, the challenge to the authority of counsel was seasonably interposed, it is not important to decide, for in any event, the trial court, or this court, has power, at any stage of the case, to require an attorney, one of its officers, to show his authority to appear."

In its brief the appellant argues (p. 28) that since the motions to dismiss set forth affirmative matters and at the same time do not contain denials of the allegations in the intervention application, they constitute affirmative defenses under Rule 8(c) of the Rules of Civil Procedure and must be deemed to admit the truth of the allegations of the intervention application under Rule 8(d). But Rule 8(d) expressly declares that such a result only applies to averments in a pleading to which a responsive pleading is required. The motions to dismiss, however, are not responsive pleadings. In fact, the application to intervene requested in its prayers for relief (R. 423) that the court

enter an order allowing the applicant to file the application and be made a party to the anti-trust suit. The court entered an order merely setting the application down for hearing and directing that the parties be given notice thereof (R. 425-426). At no time did the court enter any order granting the applicant leave to file its application or directing the parties in the anti-trust suit to answer the same. Under such circumstances the motions cannot be responsive pleadings.

The contention of the appellant is particularly surprising in view of its next preceding argument to the effect that the motions did not raise any question concerning the merits (Appellant's Brief, p. 27), because it was made and granted on the limited grounds of the lack of authority of the attorneys to represent Panhandle Eastern in making or prosecuting the application on its behalf. Since the motions admittedly did not raise any question on the merits, how is it possible for the appellant to argue that the merits of the allegations of its application were at issue before the court below?

POINT II.

The appeals should be dismissed on the ground that the order appealed from is not a final order and, therefore, is not appealable to this or any other court under the provisions of the Expediting Act governing appeals in equity suits under the Federal Anti-Trust Laws, wherein the United States is complainant.

The Expediting Act (U. S. C. A., Title 15, Sections 28 and 29) consists of two sections, the second section reading as follows (U. S. C. A., Title 15, Section 29):

> "APPEALS TO SUPREME COURT. In every suit in equity brought in any district court of the United States under any of the laws mentioned in the preceding section, wherein the United States is complainant, an appeal from the final decree of the district court will lie only to the Supreme Court and must be taken within sixty days from the entry thereof. (Feb. 11, 1903, c. 544, §2, 32 Stat. 823; Mar. 3, 1911, c. 231, §291, 36 Stat. 1167.)"

The preceding section to which reference is made deals with suits in equity under the Federal Anti-Trust Laws, wherein the United States is complainant.

The suit which is pending in the District Court, in which the appellant sought to intervene, is a suit in equity under the Federal Anti-Trust Laws, wherein the United States is complainant, and, therefore, it comes within the class of cases to which the Expediting Act applies.

Obviously, the order of the District Court, dismissing appellant's application for leave to intervene (R. 565) on the limited ground that the attorneys were not authorized by the appellant to bring or prosecute the application on its behalf (R. 520), cannot be a final order on the merits. In fact, the appellant argues at some length in its brief (p. 27) that the order was not a determination of the merits of that application.

Under these circumstances this order cannot have the necessary finality on which to base an appeal to this Court or to any other court under the provisions of the Expediting Act as construed by this Court in the case of *United States* v. *California Cooperative Canneries*, 279 U. S. 553, where this Court said at page 558:

> "Thus, Congress limited the right to review" (referring to the provisions of the Expediting Act) "to an appeal from the decree which disposed of all

matters, see *Collins* v. *Miller*, 252 U. S. 364; and it precluded the possibility of an appeal to either court'' (referring to the Circuit Court of Appeals and to this Court) ''from an interlocutory decree.''

POINT III.

The Court below was correct in dismissing the intervention application in the name of Panhandle Eastern Pipe Line Company because it was not authorized by Panhandle Eastern Pipe Line Company, and the attorneys making said application and prosecuting this appeal have not been authorized by Panhandle Eastern Pipe Line Company to act in its behalf.

The mere statement of the facts in this case demonstrates that the intervention application in the name of Panhandle Eastern was unauthorized and that the court below was correct in dismissing it. The representatives of Mokan, who are prosecuting this appeal, predicate their authority to make this application on Panhandle Eastern's behalf on resolutions (R. 423, 425), which they claim were adopted over the opposing vote of Mr. Dunn, the majority stockholder, at the annual meeting of stockholders of Panhandle Eastern held on March 11, 1940. They say that Mr. Dunn's vote was improperly and illegally cast because he did not exhibit at the meeting specific instructions from Columbia Oil under the provisions of the Consent Decree (R. 147), directing him to oppose such resolutions, and, in addition, because the intervention application contemplated by said resolutions was directed against Columbia Oil, and, therefore, even if he did have specific directions from Columbia Oil he was disqualified from voting upon such directions (R. 462). Similar tactics were employed through-

out the meeting by the minority stockholders, led by Mr. Logan and his associates representing Mokan, in attempting to disqualify Mr. Dunn, the majority stockholder, from voting in opposition to any motions or resolutions which the minority interests moved for adoption at the meeting (R. 428-487).

The proceedings at the meeting disclose a most disorderly attempt by minority stockholders to wrest control of the meeting from Mr. Dunn, the majority stockholder, who was appointed Trustee of Columbia Oil's stock under the Consent Decree in the Government's anti-trust suit and who is the Government's representative in supervising the operations of Panhandle Eastern. These minority stockholders claim that by their tactics they succeeded at the meeting in amending the by-laws of Panhandle Eastern to provide (a) for the increase of the Board of Directors from nine to fourteen directors, (b) for officers to be chosen by the stockholders instead of by the directors, and (c) for all officers' salaries to be fixed by the stockholders instead of by the directors, despite the fact that the majority stockholder voted in opposition to these proposed amendments (R. 451, 460), and despite the further fact that no notice of the amendments was contained in the notice of the meeting (R. 500-501) in violation of the provisions of the by-laws (R. 499). The minority interests further claim that there were duly elected, over the opposing vote of the majority stockholder (R. 458), five additional directors, who were nominees of Mokan, in addition to the nine directors who had been elected, of which three were nominees of Mokan, thus, claiming that they had succeeded in seizing control of the Board of Directors. They further claim that a president, vice-president, secretary and treasurer of their own choosing were elected over the opposing vote of the majority stockholder (R. 460).

The Chancellor of State of Delaware has already decreed that this attempted sleight-of-hand by the representatives of Mokan was wholly void and of no effect, that they had not succeeded in amending the by-laws at the meeting, and that they had not succeeded in electing five additional directors and new officers of their own choosing (Appendix A).

Mr. Creveling, who is thus officially recognized as the President of Panhandle Eastern, has submitted an affidavit (R. 427), in which he states that neither the duly constituted directors nor the duly constituted officers of Panhandle Eastern authorized Mr. Logan and his associates, who are prosecuting the instant intervention application in the name of Panhandle Eastern, to act on behalf of Panhandle Eastern in the matter. In fact, Mr. Logan and his associates do not claim that their authority to prosecute the application emanates from the directors or the officers of Panhandle Eastern. They claim their alleged authority solely by reason of the alleged adoption at the stockholders' meeting over the opposing vote of Mr. Dunn, the majority stockholder, of certain resolutions, providing, among other things, for Panhandle Eastern to intervene in the Government's anti-trust suit (R. 462). Therefore, it is only necessary to consider whether the vote of Mr. Dunn, as Trustee, was properly and legally cast under the provisions of the Consent Decree and pursuant to the directions received from Columbia Oil, the beneficial owner of the stock held by him as such Trustee.

Enormous responsibilities and obligations are imposed on Mr. Dunn, as Trustee of Columbia Oil's stockholdings in Panhandle Eastern under the Consent Decree. Panhandle Eastern is an important corporation which enjoys large earnings. Columbia Oil's stock in Panhandle Eastern consists of a majority of the issued and outstanding

common stock and all of the issued and outstanding preferred stock (R. 429, 431), which, because of cumulative voting (R. 489), is entitled to elect six of the nine directors of Panhandle Eastern (R. 523). In the appointment of Mr. Dunn, as Trustee under the Consent Decree, the Government realized the responsibilities placed upon his shoulders. The court below, in discussing this aspect of the matter, remarked (R. 522):

> "The selection of Gano Dunn as Trustee was made by the Attorney General of the United States as the person best qualified to serve in a very difficult and exacting position from a group of names submitted to him."

In order to enable him to discharge his exacting duties, Mr. Dunn is vested with equally broad discretionary powers under the Consent Decree. Pursuant to the provisions thereof (R. 146), he holds as Trustee the legal title to all Columbia Oil's stock in Panhandle Eastern and is authorized to exercise "all the rights and privileges incidental to absolute ownership thereof" subject to certain conditions. As such Trustee, he is given broad discretionary voting powers. He is authorized to vote Columbia Oil's stock for as many directors of Panhandle Eastern as the number of shares thereof might be entitled to elect; he is to act as one of the directors and the remainder to be elected by him are to be selected from among persons recommended by Columbia Oil, in conference with him and with his advice. He is also authorized to remove and replace such directors with others of his own choosing (R. 146). He is also given broad discretionary powers with respect to voting the stock upon all other questions, in the following terms (R. 147):

> "(b) To vote said stock upon all other questions and matters in which the stock is entiled to vote, as

directed by the beneficial owners thereof, except when such directions are inconsistent with the purposes of this decree;".

When Columbia Oil received notice of the annual meeting of the stockholders of Panhandle Eastern to be held on March 11, 1940, which specified only two items of business to be acted upon at the meeting, namely, (a) the election of directors for the ensuing year, and (b) the management's proposed amendment to the certificate of incorporation to provide for the payment of participating dividends during any year when additional common stock is issued (R. 500), Columbia Oil in pursuance of the provisions of the decree promptly recommended certain persons to Mr. Dunn, in conference with him and with his advice, from whom Mr. Dunn selected six, who would receive his vote on the election of directors at said meeting (R. 504-505, 518-519). Columbia Oil also gave appropriate instructions regarding the manner in which Mr. Dunn should vote the stock on the management's proposed amendment to the certificate of incorporation (R. 503, 518), which instructions were subsequently modified by later instructions (R. 506-507, 519). As to all other matters which might come before the meeting, Columbia Oil gave Mr. Dunn the following instructions on how he should vote the stock (R. 503, 518):

> "that as to all other matters except election of directors, which might come before said meeting, he should vote said shares as, in his discretion, seemed best for the interest of Panhandle Eastern Pipe Line Company and generally to support the management; that, in case any matters were presented at the meeting on which he had any doubt as to how to vote, he could adjourn the meeting for a sufficient time to confer by telephone with the representatives of Columbia Oil & Gasoline Corporation."

Since Mr. Dunn was authorized by the Consent Decree to vote the stock on all questions other than the election of directors as directed by the beneficial owners thereof, except when such directions were inconsistent with the purposes of the decree, and since Columbia Oil's directions were to vote the stock on such matters as in his discretion seemed best for the interest of Panhandle Eastern and generally to support the management, Mr. Dunn was duly vested with such broad discretionary powers that he could vote the stock on such matters at the meeting in such manner as his judgment might dictate.

Thus, when Mr. Dunn attended the meeting, he had received from Columbia Oil all the instructions regarding the voting of the stock which it was humanly possible to give him in respect to the contemplated items of business to be transacted at the meeting as well as in respect to any surprise matters which might come before the meeting. As the court below said (R. 523):

> "From the foregoing, it appears that Gano Dunn attended the annual meeting of March 11 girded with his own authority as Trustee, supplemented by all the directions from Columbia Oil that could have been anticipated in the normal course of human events."

But the first objection which Mr. Logan and his associates made to Mr. Dunn's vote, cast in opposition to the resolutions contemplating the making of the intervention application, was that Mr. Dunn did not exhibit specific instructions that he should vote in opposition to such resolutions. The answer to this proposition is contained in the Consent Decree and Columbia Oil's directions thereunder. The Decree did not provide that Columbia Oil must give specific directions and Columbia Oil saw fit not to give specific

directions, leaving to Mr. Dunn's discretion the manner in which he should vote on all surprise motions. Obviously, the provision requiring Mr. Dunn to vote as directed by the beneficial owner of the stock was inserted in the Decree for the protection of Columbia Oil. It was not placed in the decree for the benefit of any other party. Hence, Mokan, or any other minority stockholder of Panhandle Eastern, cannot complain about the instructions which Mr. Dunn received from Columbia Oil as being too general. The only one affected by the manner in which Mr. Dunn carried out its instructions is Columbia Oil, and Columbia Oil was satisfied with the manner in which Mr. Dunn had carried out its directions. Columbia Oil's Board of Directors subsequently approved the manner in which Mr. Dunn voted (R. 509-510).

The contentions of Mr. Logan and his associates merely boil down to the surprising proposition that Mokan, as a minority stockholder in Panhandle Eastern, is legally entitled at any time it sees fit to overrule the vote of the majority stockholder and to take over the control of Panhandle Eastern. This must necessarily be the contention of Mr. Logan and his associates, because it follows from his objections at the meeting that, whenever the representatives of Mokan see fit to make a surprise motion or to submit for adoption a surprise resolution, Mr. Dunn cannot vote Columbia Oil's stock because no one could have anticipated such a surprise action and, therefore, Mr. Dunn could not possibly have obtained specific instructions as to how to vote thereon. This is indeed a strange contention when it is realized that Mr. Dunn is the Government's representative under the Consent Decree. Are his votes of the majority stock in Panhandle Eastern to be thus easily challenged?

The second objection which was made by the representatives of Mokan to Mr. Dunn's vote, cast in opposition to the resolutions in question, was that, since the intervention application contemplated by the resolutions was directed against Columbia Oil and others, Mr. Dunn could not vote according to the directions of Columbia Oil. There are two answers to this proposition, the first being that Columbia Oil's instructions to Mr. Dunn left it entirely to his judgment as to how to cast his vote; the second answer is that, even in the complete absence of directions from Columbia Oil, Mr. Dunn would still be able to exercise the same broad discretion in voting under the provisions of the Consent Decree.

The vote of Mr. Dunn, as Trustee under the Consent Decree and as the holder of record of all of Columbia Oil's stock in Panhandle Eastern (R. 150, 448), was legal and valid under the laws of Delaware (Sections 17 and 18 of the Delaware Corporation Law*) and under the provisions of the by-laws of Panhandle Eastern (R. 489-490). Mr. Dunn's vote was legal and proper and he was acting within the powers vested in him by the Consent Decree and within the directions received from Columbia Oil. So the court below found (R. 525):

> "In construing the language of the consent decree, I find that the votes cast by Gano Dunn were authorized by the powers conferred upon him by the consent decree and that his votes were well within the directions given to him by Columbia Oil."

One other matter merits consideration. The general scope of Columbia Oil's directions, within which Mr. Dunn

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* Sections 17 and 18 of the General Corporation Laws of the State of Delaware are printed in full in Appendix D at the end of this brief.

was to exercise his discretion in voting at the meeting, was that he should vote the stock as, in his discretion, seemed best for the interest of Panhandle Eastern and generally to support the management. In voting the majority stock against the resolution providing for Panhandle Eastern to intervene in the Government's anti-trust suit, Mr. Dunn's action was definitely within the scope of these directions. Mokan had already attempted to intervene in the anti-trust suit on substantially the same state of facts on two different occasions (R. 284-312, 362-371), the first application (R. 308) having been made by Mokan both in its own right and also as a derivative stockholder's application on behalf of Panhandle Eastern. Both these applications had been denied (R. 321-322, 371). It definitely appears, therefore, that Mr. Dunn was acting for the benefit of Panhandle Eastern in voting against resolutions which might very well subject it to the payment of large counsel fees on a matter which probably would be unproductive of results. Furthermore, he undoubtedly saw no reason for Panhandle Eastern employing the attorneys of the minority stockholders for such a purpose. Panhandle Eastern had its own counsel who would have been well able to undertake such a litigation if it had appeared advisable to Panhandle Eastern to follow such a course.

In the appellant's brief (pp. 31-38), a number of cases involving minority stockholders' suits are referred to and cited, and the general principle is developed that a majority stockholder occupies a fiduciary position to the minority stockholders. We cannot understand what application these cases have to the case at bar. This is not a minority stockholders' suit. This is a suit brought in the name of the corporation by attorneys of a minority stockholder claiming that they have been employed by the corporation to bring and prosecute the action under resolu-

tions of its stockholders, which were never adopted because the majority stockholder voted the majority stock against the resolutions.

Furthermore, Mr. Dunn is not an ordinary stockholder; he is acting as Trustee of the majority stock under the provisions of a Consent Decree. He is already a fiduciary. His primary duties in his capacity as such Trustee are to the Government and to the court of his appointment. His vote at the stockholders' meeting, which is the only question involved in this case, was neither fraudulent or oppressive as to minority stockholders because, as we have just shown, he voted in the interests of Panhandle Eastern and well within the powers vested in him by the Consent Decree.

It is well settled that a majority stockholder does not become a trustee for a minority in any event, unless the action of the majority stockholder is fraudulent and oppressive. Therefore, the minority stockholders of Panhandle Eastern could not even maintain a minority stockholders' suit predicated on the vote which Mr. Dunn cast in opposition to the resolutions in question. But the instant suit, as we have shown, is not a minority stockholders' suit. The sole question involved is the authority of the attorneys to make and prosecute the intervention application in the name of the corporation; not the question of whether a majority stockholder occupies a fiduciary relationship to the minority stockholders. The later question assumes the proposition that the minority stockholders' suit has been properly brought.

Conclusion.

It is our firm belief that no case could be conceived of in which the facts would show such an utter lack of authority on the part of attorneys to represent a corporation in

bringing and prosecuting a proceeding on its behalf. Even if we should assume, however, that such authority existed, then the intervention application would be subject to the same infirmities as Mokan's fourth intervention application. These infirmities have been fully discussed in our brief on appeal No. 268.

For the foregoing reasons, therefore, this appellee, Columbia Oil & Gasoline Corporation, respectfully requests this Court to dismiss for lack of jurisdiction appellant's appeal from the order of the District Court dismissing its intervention application, or, if this Court considers that it has jurisdiction, to affirm the order of the District Court.

Respectfully submitted,

DANIEL O. HASTINGS,
Continental American Building,
Wilmington, Delaware.

WILLIAM H. BUTTON,
27 Cedar Street,
New York, N. Y.

JAMES B. ALLEY,
50 Broadway,
New York, N. Y.

Of Counsel:
WILLIAM H. BUTTON,
JAMES B. ALLEY.

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Appendix A.

Reported in 32 Federal Supplement, 474.

UNITED STATES v. COLUMBIA GAS & ELECTRIC CORPORATION, *et al.*

No. 1099.

DISTRICT COURT, D. DELAWARE.

April 6, 1940.

In Equity. Anti-trust suit by the United States of America against the Columbia Gas & Electric Corporation and others, wherein a consent decree was entered. On motion to dismiss application by the Panhandle Eastern Pipe Line Company to become a party for a limited purpose.

Motion granted.

Robert J. Bulkley, of Cleveland, Ohio, Russell Hardy, of Washington, D. C., and Arthur G. Logan (of Logan & Duffy), of Wilmington, Del., for petitioner.

William H. Button and James B. Alley (of Auchincloss, Alley & Duncan), both of New York City, and Daniel O. Hastings (of Hastings, Stockly & Layton), of Wilmington, Del., for Columbia Oil & Gasoline Corporation.

Douglas M. Moffat (of Cravath, deGersdorff, Swaine & Wood), of New York City, and Clarence A. Southerland (of Southerland, Berl, Potter & Leahy), of Wilmington, Del., for Columbia Gas & Electric Corporation.

Thomas J. Lynch, Sp. Asst. to Atty. Gen. and Stewart Lynch, U. S. Atty., of Wilmington, Del., for the United States.

Edward N. Goodwin, of New York City, and Hugh M. Morris and Edwin D. Steel, Jr., both of Wilmington, Del., for Panhandle Eastern Pipe Line Co.

NIELDS, District Judge.

Motion to dismiss application to become a party for a limited purpose.

In the anti-trust suit of United States *v.* Columbia Gas & Electric Corporation, Columbia Oil & Gasoline Corporation, and others, a consent decree was entered by this court January 29, 1936. The closing paragraph of the decree provides: "* * * that Panhandle Eastern (Panhandle Eastern Pipe Line Company), upon proper application, may become a party hereto for the limited purpose of enforcing the rights conferred by Section IV hereof."

The sole question raised by the motion to dismiss is whether Panhandle Eastern has made a "proper application" to become a party to this suit. March 23, 1940, a document in the form of an unverified application to become a party was filed. This document is signed "Panhandle Eastern Pipe Line Company By Arthur G. Logan". Immediately below this signature appear "Arthur G. Logan Logan & Duffy Attorneys for Petitioner, 303 Delaware Trust Building, Wilmington, Delaware". Below and to the left of these signatures the following names of counsel are typed: "Russell Hardy", "Robert J. Bulkley", "Arthur G. Logan".

The propriety of the application to become a party turns upon the terms of the consent decree. By Section III of that decree Gano Dunn was appointed Trustee for the purposes and with the powers and duties set forth in that section. The decree further provides:

"That within 10 days after the entry of this decree Columbia Oil shall transfer all of its stock now owned and thereafter all stock subsequently acquired in Panhandle Eastern, having present or potential voting rights, to said trustee to hold the legal title to said stock and to exercise all the rights and privileges incidental to the absolute ownership thereof upon the following terms and conditions:

"(a) To vote said stock for the election of as many directors of Panhandle Eastern as the number of shares thereof may be entitled to elect; Provided, that one of the directors so elected shall be the trustee; and that the remainder shall be selected from among persons recommended by the beneficial owner of said stock, in conference and

with the advice of the trustee, and that, as to the directors so selected, the trustee is empowered to remove and replace such directors with others of his own choosing upon his own motion, if in his judgment such action is necessary in the interest of Panhandle Eastern or for the effectuation of the purposes of this decree; subject, however, in this as well as in the exercise of all other powers to the authority of this Court upon the motion and showing of any party hereto, or upon its own motion, to restrain said trustee from abuses of sound discretion, in view of the purposes of this decree and the law under which it is entered, or in case said trustee does not act in good faith hereunder;

"(b) To vote said stock upon all other questions and matters in which the stock is entitled to vote, as directed by the beneficial owners thereof, except when such directions are inconsistent with the purposes of this decree."

The business of a corporation is conducted by its board of directors and officers. The control of Panhandle Eastern was vested in the Trustee. He was one of the directors. He shares with Columbia Oil in the selection of the others. He was empowered to remove any of the other directors and replace such directors by others of his own choosing upon his own motion. As the board of directors chose the officers, the Trustee was the final word in the conduct of the business of Panhandle Eastern. This control should be borne in mind in construing paragraph (b) of the decree.

The selection of Gano Dunn as Trustee was made by the Attorney General of the United States as the person best qualified to serve in a very difficult and exacting position from a group of names submitted to him.

Notice of the regular annual stockholders' meeting of Panhandle Eastern to be held March 11, 1940, was duly sent to stockholders. It notified them that the proposed business to be considered at the meeting would be the election of directors for the ensuing year, an amendment of the certificate of incorporation, and such other business as might properly come before the meeting.

Mindful of paragraph (b) of Section III of the decree, Gano Dunn obtained from the executive head of Columbia Oil, the beneficial owner of the stock of Panhandle Eastern held by him, directions as to voting said stock at the annual meeting. March 5, 1940, Don M. Wilson, a vice president of Columbia Oil and acting president, directed Gano Dunn to vote the shares of stock held by him in favor of the amendment to the articles of incorporation proposed by the Board, and as to other matters, excepting the election of directors, to vote said shares "as, in his discretion, seemed best for the interest of Panhandle Eastern Pipe Line Company and generally to support the management; that, in case any matters were presented at the meeting on which he had any doubt as to how to vote, he could adjourn the meeting for a sufficient time to confer by telephone with the representatives of Columbia Oil & Gasoline Corporation". March 8, 1940, the board of directors of Columbia Oil adopted a resolution expressly approving said directions and also approving a letter from Wilson to Dunn containing the following directions:

"Dear Mr. Dunn:

After consultation with you, as Trustee holding the voting stock in Panhandle Eastern Pipe Line Company, which is owned by this Corporation, and with your advice, we recommend the following individuals for your selection as Directors of Panhandle Eastern Pipe Line Company, and request that you elect them as such by vote of the stock which you hold as Trustee:

Joseph A. Bower	165 Broadway	New York City
Joe D. Creveling	90 Broad Street	New York City
Gano Dunn	80 Broad Street	New York City
Walter G. Mortland	37 East 64th St.	New York City
Richard C. Patterson, Jr.	1270 Sixth Avenue	New York City
Robert C. Winmill	1 Wall Street	New York City

Very truly yours,

(signed) D. M. Wilson
Vice President."

Before determining upon the six directors named in the above letter, Columbia Oil in conference with Dunn recommended certain persons as directors and from among the number so recommended Dunn selected the six above named as the six of the nine directors of Panhandle Eastern which the stock beneficially owned by Columbia Oil was entitled to elect.

From the foregoing, it appears that Gano Dunn attended the annual meeting of March 11 girded with his own authority as Trustee, supplemented by all the directions from Columbia Oil that could have been anticipated in the normal course of human events.

March 11, 1940, at the opening of the annual stockholders' meeting, Creveling, President of Panhandle Eastern, took the Chair and called the meeting to order as provided in the by-laws. The Chairman announced the presence of a quorum. Thereupon, Logan, who appeared as a stockholder, moved that Dixon, as associate of Maguire, be made Chairman of the meeting "from this time forward." Creveling declared the motion out of order. Thereupon, Logan took an appeal from the ruling of the Chairman. A vote was taken. Gano Dunn voted to uphold the Chair while Logan and his associates voted the contrary. Creveling announced that his ruling had been upheld.

Shortly thereafter, Logan moved that Article II of the by-laws be amended to read: "The property and business of this corporation shall be managed by its board of directors, consisting of 14 persons."

This drastic action of increasing the number of directors from 9 to 14 was proposed without notice thereof, and evidently with the intent to acquire control of a large and valuable property. The Chairman declared the motion out of order in view of Article 42 of the by-laws, providing that the by-laws may be altered or amended "if notice of the proposed alteration or amendment be contained in the notice of the meeting". An appeal was taken with the same result as in preceding instances.

Motions were made that the Class B stock be not allowed to vote; that officers of the company be chosen by

the stockholders; that their salaries be fixed by the stockholders; that Maguire be made president and Tringham treasurer of the company. These motions were disposed of as the others had been. In each instance Dunn voted the majority of the voting stock against the motions, and Logan and his associates voted for the motions.

Hand moved that Panhandle Eastern become a party to the suit of Missouri-Kansas Pipe Line Company and Dammann against the Columbia companies. This motion was similarly disposed of. Hand further moved that the Class A stock of Panhandle Eastern be redeemed. This motion met the same fate.

The following motion concisely states the position of Logan and his associates throughout the meeting: "Mr. President, I now move that this corporation refuse to accept any vote of Mr. Gano Dunn on any question unless he first establishes by competent proof that he has been directed by Columbia Oil and Gasoline Corporation to cast his vote in accordance with the way he may cast it due to the fact that this corporation is aware of the limitation upon his powers."

Later, Hand moved that Panhandle Eastern be directed to bring six suits as suggested in a letter of January 15, 1940 from Missouri-Kansas Pipe Line Company to Panhandle Eastern. The fourth item of this letter was an instruction that Panhandle Eastern intervene in this anti-trust suit by the United States pending in this court. At this meeting a resolution was offered by Hand that Panhandle Eastern be directed to make the present application. Gano Dunn, holding a majority of the voting stock of Panhandle Eastern, voted against the resolution and it was accordingly defeated.

It was further moved: "That this corporation will employ Robert J. Bulkley of Cleveland, Ohio, Russell Hardy of Washington, D. C. and Arthur Logan of Wilmington, Delaware, as its attorneys to take action provided for herein," and further, "that the officers of this corporation arrange and pay a reasonable compensation to said attorneys for such services."

Thereafter, the meeting adjourned, although as to adjournment Logan objected that Gano Dunn was not qualified to vote without producing before the meeting specific instructions from Columbia Oil.

After adjournment Logan and his associates held a meeting of their own. No quorum was present. Holders of a minority of the stock of Panhandle Eastern, either in person or by proxy, were the only persons present. The motions of Logan and of his associates, defeated at the regular meeting, were resubmitted at the subsequent meeting, and purported to be passed.

March 20, 1940, a special meeting of the Board of Directors of Columbia Oil was held. The Chairman stated that he had received an official stenographic transcript of the proceedings of the annual meeting of stockholders of Panhandle Eastern of March 11, 1940. Upon consideration of those minutes and of the manner in which Gano Dunn, Trustee, had voted the stock in Panhandle Eastern, it was resolved: "That all of the votes and all of the positions taken by said Gano Dunn as Trustee or otherwise at said stockholders' meeting be and the same hereby are in all respects approved, ratified and confirmed".

In construing the language of the consent decree, I find that the votes cast by Gano Dunn were authorized by the powers conferred upon him by the consent decree and that his votes were well within the directions given to him by Columbia Oil. From this finding, it follows that the so-called application filed in this proceeding was not authorized by Panhandle Eastern or by any responsible body having control of said corporation.

The motion to dismiss the alleged application of Panhandle Eastern for leave to become a party hereto and for other relief must be granted for the following reasons:

1. Said application was not authorized by Panhandle Eastern.

2. The attorneys whose names appear on said application as attorneys for Panhandle Eastern were not author-

ized by that company to act in its behalf in filing such application.

3. Gano Dunn, Trustee, duly voted the shares of stock of Panhandle Eastern on all matters on which he voted at the annual meeting of March 11, 1940, in accordance with provisions of said consent decree, and pursuant to valid directions from Columbia Oil.

An order may be submitted.

Appendix B.

IN THE

COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MISSOURI-KANSAS PIPE LINE COMPANY,
Complainant,

vs.

PANHANDLE EASTERN PIPE LINE COMPANY, JOE D. CREVELING, LOUIS F. SPERRY, JOSEPH J. BODELL, DAVID BOYD-SMITH, HUBERT E. HOWARD, GEOFFREY MELLOR and WILLIAM C. TRINGHAM,
Respondents.

FINAL DECREE

AND NOW, TO-WIT, this 19th day of June, A. D. 1940, the above stated cause having come on to be heard before the Chancellor, upon testimony of witnesses and exhibits, and the said cause having been fully argued before the Chancellor,

IT IS ORDERED, ADJUDGED AND DECREED BY THE CHANCELLOR as follows:

(1) That the Bill of Complaint filed in the above-entitled cause shall be and the same is hereby dismissed.

(2) That at the annual meeting of stockholders of Panhandle Eastern Pipe Line Company held on March 11, 1940,

each of the following persons was duly elected a director of said corporation, to serve for one year from date of said meeting, or until his successor should be elected and should qualify:

Joe D. Creveling
Joseph A. Bower
William J. Bulkley
A. Faison Dixon
Gano Dunn
William C. Maguire
Walter C. Mortland
Richard C. Paterson
Robert C. Winmill

(3) That none of the following persons, who were nominated for directors of Panhandle Eastern Pipe Line Company at said meeting, were duly or properly elected directors thereat:

Joseph J. Bodell
David Boyd-Smith
Hubert E. Howard
Geoffrey Mellor
William C. Tringham

(4) That at the date of the said annual meeting of stockholders, and on April 25, 1940, the date when the cause was heard, the following persons were the officers of the corporation:

Joe D. Creveling, President
Gerard J. Neuner, Vice-President in Charge of Operations
Robert D. Field, Vice-President
Leith V. Watkins, Secretary and Controller
Louis F. Sperry, Treasurer

(5) That although certain stockholders at said annual meeting of Panhandle Eastern Pipe Line Company pur-

ported to elect the following persons as officers of the corporation:

William G. Maguire	President
Gerard J. Neuner	Vice-President
Leith V. Watkins	Secretary
William C. Tringham	Treasurer

none of such persons were duly or properly elected officers by virtue of such action.

(6) That the action of certain stockholders at said annual meeting purporting to amend the by-laws of Panhandle Eastern Pipe Line Company was void and without effect and such by-laws were not modified in any respect whatsoever by any action taken at said meeting.

(7) That costs of the above-entitled cause shall be paid by the Complainant, Missouri-Kansas Pipe Line Company, within 30 days from the date hereof, or attachment.

/s/ Wm. Watson Harrington
Chancellor.

Appendix C.

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

WILLIAM WATSON HARRINGTON
Chancellor

Chancellor's Chambers
Dover, Delaware
June 11th, 1940

In re Missouri Kansas Pipe Line Co. *vs.* Panhandle Eastern Pipe Line Co. *et al.*

HON. HUGH M. MORRIS,
HON. DANIEL O. HASTINGS,
ARTHUR T. LOGAN, Esq.,
CHRISTOPHER L. WARD, JR., Esq.,
Attorneys-at-law,
Wilmington, Delaware.

Application to review an election of directors and officers under Section 31 of the Delaware Corporation Laws.

Gentlemen:

After a thorough examination of the record of the proceedings of the stockholders' meeting in question, my conclusion is that the fair inference to be drawn therefrom is that the votes taken at that meeting were based on stock ownership, and not on the mere votes of the various persons present, regardless of the number of shares owned by them. It, therefore, necessarily follows that the corporate by-laws were not changed at that meeting, and that the Board can only consist of nine members, and not of fourteen as is contended by Mr. Logan.

There may be cases where the facts and circumstances are such as to justify the conclusion that the right to a stock vote has been waived by a failure to expressly demand it on a particular vote; but, as I view it, this is not a case of that nature.

The provisions of the court order under which title to a large block of stock was vested in Mr. Dunn, have an important bearing on this conclusion; and this is particularly true as it is difficult to escape the conclusion that all of the provisions of this order were well known to the Mokan group, who claim that they ultimately controlled the meeting. From this aspect of the case, it is unnecessary for me to consider whether the by-laws could have been amended, without notice, or whether the fact that they were originally adopted by the incorporators, who were the only stockholders at that time, is an answer to any such contention.

There is no dispute as to the validity of the election of nine members of the Board, but there is a dispute as to the other five persons who, also, claim to be members of that Board. In view of the possible complications growing out of this contention, a speedy determination of this case is essential to efficient corporate management; and, because my conclusion is largely based on questions of fact, considered in connection with the pertinent statutory, charter and by-law provisions, it seems unnecessary to delay an announcement until I shall have had an opportunity to write an opinion.

Whatever foundation there may be for the charge that Mokan has been unfairly treated in the past by the corporation holding the controlling stock interest in Panhandle Eastern, I do not see how that question can be considered in this controversy. Nor am I impressed by the contention that, even if Mr. Dunn's votes be considered as stock votes, they were void because he did not have the express directions of his principal with regard to certain matters that came before the meeting.

Counsel for the respondents may present such an appropriate order as will carry out these conclusions.

Yours sincerely,

/s/ W. W. Harrington.

WWH.B

Appendix D.

Sections of the General Corporation Laws of the State of Delaware Referred to in This Brief.

SECTION 17. POWER OF STOCKHOLDERS TO VOTE IN PERSON OR BY PROXY; LIMITATION OF POWER; CLOSING OF TRANSFER BOOKS OR FIXING DATE FOR DETERMINATION OF STOCKHOLDERS OF RECORD FOR CERTAIN PURPOSES; CUMULATIVE VOTING: QUORUM:—Unless otherwise provided in the Certificate of Incorporation, each stockholder, shall at every meeting of the stockholders be entitled to one vote in person or by proxy for each share of the capital stock held by such stockholder, but no proxy shall be voted on after three years from its date, unless said proxy provides for a longer period, and, except where the transfer books of the corporation shall have been closed or a date shall have been fixed as a record date for the determination of its stockholders entitled to vote, as hereinafter provided, no share of stock shall be voted on at any election for directors which shall have been transferred on the books of the corporation within twenty days next preceding such election of directors.

The board of directors shall have power to close the stock transfer books of the corporation for a period not exceeding fifty days preceding the date of any meeting of stockholders or the date for payment of any dividend or the date for the allotment of rights or the date when any change or conversion or exchange of capital stock shall go into effect or for a period of not exceeding fifty days in connection with obtaining the consent of stockholders for any purpose; provided, however, that in lieu of closing the stock transfer books as aforesaid, the by-laws may fix or authorize the board of directors to fix in advance a date, not exceeding fifty days preceding the date of any meeting of stockholders, or the date for the payment of any dividend, or the date for the allotment of rights, or the date

when any change or conversion or exchange of capital stock shall go into effect, or a date in connection with obtaining such consent, as a record date for the determination of the stockholders entitled to notice of, and to vote at, any such meeting and any adjournment thereof, or entitled to receive payment of any such dividend, or to any such allotment of rights, or to exercise the rights in respect of any such change, conversion or exchange of capital stock, or to give such consent, and in such case such stockholders and only such stockholders as shall be stockholders of record on the date so fixed shall be entitled to such notice of, and to vote at, such meeting and any adjournment thereof, or to receive payment of such dividend, or to receive such allotment of rights, or to exercise such rights, or to give such consent, as the case may be, notwithstanding any transfer of any stock on the books of the corporation after any such record date fixed as aforesaid.

The Certificate of Incorporation of any corporation may provide that at all elections of directors of such corporation, each stockholder shall be entitled to as many votes as shall equal the number of his shares of stock multiplied by the number of directors to be elected, and that he may cast all of such votes for a single director or may distribute them among the number to be voted for, or any two or more of them as he may see fit, which right, when exercised, shall be termed cumulative voting.

The provisions of this Section shall not apply, however, to corporations not for profit, for which it is desired to have no capital stock. Unless otherwise provided in the Certificate of Incorporation of a corporation which is to have no capital stock, or in an amendment thereto, each member of such corporation shall at every meeting of members be entitled to one vote in person or by proxy, but no proxy shall be voted on after three years from its date, unless said proxy provides for a longer period.

Subject to the provisions of this Chapter in respect of the vote that shall be required for a specified action, the Certificate of Incorporation or by-laws of any corporation

may specify the number of shares and/or the amount of other securities having voting power the holders of which (or in the case of a corporation with no capital stock, the number of members thereof having voting power who) shall be present or represented by proxy at any meeting in order to constitute a quorum for, and the votes that shall be necessary for, the transaction of any business.

SECTION 18. FIDUCIARY STOCKHOLDERS; VOTING POWER OF; VOTING TRUSTS:—Persons holding stock in a fiduciary capacity shall be entitled to vote the shares so held, and persons whose stock is pledged shall be entitled to vote, unless in the transfer by the pledgor on the books of the corporation he shall have expressly empowered the pledgee to vote thereon, in which case only the pledgee, or his proxy may represent said stock and vote thereon.

One or more stockholders may by agreement in writing deposit capital stock of an original issue with or transfer capital stock to any person or persons, or corporation or corporations authorized to act as trustee, for the purpose of vesting in said person or persons, corporation or corporations, who may be designated Voting Trustee or Voting Trustees, the right to vote thereon for any period of time determined by such agreement, not exceeding ten years, upon the terms and conditions stated in such agreement. Such agreement may contain any other lawful provisions not inconsistent with said purpose. After the filing of a copy of such agreement in the principal office of the corporation in the State of Delaware, which copy shall be open to the inspection of any stockholder of the corporation or any beneficiary of the trust under said agreement daily during business hours, certificates of stock shall be issued to the Voting Trustees to represent any stock of an original issue so deposited with them, and any certificates of stock so transferred to the Voting Trustees shall be surrendered and cancelled and new certificates therefor shall be issued to the Voting Trustees, and in the certificates so issued it shall appear that they are issued pursuant to such agree-

ment, and in the entry of such Voting Trustees as owners of such stock in the proper books of the issuing corporation that fact shall also be noted. Said Voting Trustees may vote upon the stock so issued or transferred during the period in such agreement specified; stock standing in the names of such Voting Trustees may be voted either in person or by proxy, and in voting said stock, such Voting Trustees shall incur no responsibility as stockholder, trustee or otherwise, except for their own individual malfeasance. In any case where two or more persons are designated as Voting Trustees, and the right and method of voting any stock standing in their names at any meeting of the corporation are not fixed by the agreement appointing said Trustees, the right to vote said stock and the manner of voting the same at such meeting shall be determined by a majority of said Trustees, or if they be equally divided as to the right and manner of voting the same in any particular case, the vote of said stock in such case shall be divided equally among the Trustees.

At any time within one year prior to the time of expiration of any such voting trust agreement as originally fixed or as extended as herein provided, one or more beneficiaries of the trust under such voting trust agreement may, by agreement in writing and with the written consent of such Voting Trustees, extend the duration of such voting trust agreement for an additional period not exceeding ten years. Said Voting Trustees shall, prior to the time of expiration of any such voting trust agreement, as originally fixed or as previously extended, as the case may be, file in the principal office of the corporation in the State of Delaware a copy of such extension agreement and of their consent thereto, and thereupon the duration of such voting trust agreement shall be extended for the period fixed in such extension agreement; provided, however, that no such extension agreement shall affect the rights or obligations of persons not parties thereto.

SECTION 31. ELECTION OF DIRECTORS ON FAILURE TO ELECT ON REGULAR DAY; ELECTION ORDERED BY CHANCELLOR; CONTESTED ELECTIONS; HEARING BEFORE CHANCELLOR; SERVICE:—If the election for directors of any corporation shall not be held on the day designated by the by-laws, the directors shall cause the election to be held as soon thereafter as conveniently may be; no failure to elect directors at the designated time shall work any forfeiture or dissolution of the corporation, but the Chancellor may summarily order an election to be held upon the application of any stockholder, and at any such election the shares of stock represented at said meeting, either in person or by proxy, shall constitute a quorum for the purpose of such meeting, notwithstanding any provision of the by-laws of the corporation to the contrary.

Upon the application by any stockholders, the Chancellor shall have power to hear and determine the validity of any election of any director or officer of any corporation organized under this Chapter and the right of any person to hold such office, and in case any such office is claimed by more than one person may determine the person entitled thereto; and to that end make such order or decree in any such case as may be just and proper, with power to enforce the production of any books, papers and records of the corporation relating to the issue; and in case it should be determined that no valid election of the corporation has been held, the Chancellor shall have power to order an election to be held in accordance with the provisions of the first paragraph of this Section. In any such application service of copies of such petition upon the corporate resident agent of the corporation shall be deemed to be service upon the corporation and upon the person whose title to office is contested and upon the person, if any, claiming such office; and it shall be the duty of such resident agent to forward immediately a copy of said petition so delivered to him, or it, to the corporation and to the person whose title to office is contested and to the person, if any, claiming such office, in a post-paid, sealed registered letter addressed

to such corporation or such person at his or its last known postoffice address; and the Chancellor may make such further or other order respecting notice of such application as he may deem proper under the circumstances.

The Chancellor in any proceeding instituted under this Section shall have power to determine the right and power of persons claiming to own stock, to vote at any meeting of the stockholders authorized by or referred to in this Section.

The Chancellor shall have power to appoint a Master to hold any election provided for in this Section under such orders and powers as he shall deem proper; and he shall also have power to punish any officer or director for contempt, in case of disobedience of any order made by the Chancellor and may, in case of disobedience by any such corporation of any order made by the Chancellor, in his discretion, enter a decree against such corporation for a penalty in a sum not exceeding the sum of Five Thousand dollars ($5,000.00):